

A

LIM SIAW YIING

v.

WONG SENG & ANOR

B

HIGH COURT SABAH & SARAWAK, KUCHING

ABDUL AZIZ RAHIM J

[DIVORCE PETITION NO: 33-14-2005-II]

16 JANUARY 2009

C

FAMILY LAW: Divorce - Maintenance - Accommodation - Duty of husband and father to provide reasonable and suitable accommodation for wife and children - Standard of accommodation to be provided - Whether payment of rental by husband

D

FAMILY LAW: Divorce - Maintenance - Assessment - Husband having no steady job or income - Husband having health problems but able bodied - Husband to find a job suited to his skill and health condition - Whether maintenance ordered to be paid

E

FAMILY LAW: Divorce - Petition for divorce - Wife's claim for maintenance, matrimonial home, husband's EPF, insurance policy, jewelleries and car instalment payment - Whether granted

F

FAMILY LAW: Injunction - Injunction against molestation - Husband abusive - Wife physically and mentally abused - Whether injunction granted - Whether no provision in law for damages for assault, battery and cruelty

G

FAMILY LAW: Matrimonial property - Matrimonial home - Duty of each spouse to ensure that family is not deprived of their matrimonial home - Whether duty to assist each other to maintain matrimonial home

H

FAMILY LAW: Marriage - Dissolution of - Adultery - Whether proven - Circumstantial evidence of adulterous relationship - Presence of third party contributed significantly to breakdown of marriage - Whether third party to pay wife RM50,000 in damages to be held in trust for children

I

The petitioner filed this divorce petition to dissolve her marriage to the 1st respondent. The petitioner prayed, *inter alia*: (i) for maintenance for her and her two children; (ii) damages for adultery; (iii) that the 1st respondent pay the monthly instalments for two condominiums registered in their joint names and upon full payment, to transfer the properties into the joint names of the children; (iv) that the 1st respondent vacate the condominium at Kasuma Resort to provide home for the petitioner and the

children; (v) that the 1st respondent pay monthly instalments for the petitioner's car; (vi) that the 1st respondent be restrained from dissipating the funds from his insurance and EPF contributions; (vii) that the petitioner be allowed to keep the matrimonial jewellery; and (viii) that the 1st respondent be restrained from assaulting, molesting and interfering with the petitioner. The 1st respondent claimed to be unemployed and was doing car sales earning between RM300 to RM400 per month.

Held:

- (1) A sum of RM1,500 per month was a reasonable award of maintenance for the petitioner and the two children. The fact that the 1st respondent had no steady job or income or that he had health problems was not an excuse to avoid paying maintenance. The 1st respondent was able bodied and could find a job suited to his skill and health condition. The maintenance was to be paid until the children reached the age of 18 years. (para 36)
- (2) Since the Kuala Lumpur Condominium was auctioned off, there was no need to make any order as to the division of this property. The Kasuma Resort Condominium was under foreclosure proceedings and 50% of any residue of the proceeds of the auction after deducting the bank loan and permitted expenses was to be paid to the petitioner. (paras 40 & 41)
- (3) In a marriage, each spouse bears equal responsibility to ensure that the family is not deprived of their matrimonial home. If one spouse is in difficulty to maintain the matrimonial home the other spouse must assist. (para 45)
- (4) It is the duty of the husband and the father to provide a roof above his family's head. It was not fair to order the 1st respondent to vacate the Kasuma Resort Condominium and to pay off the bank loan as he did not have the financial means to do so. The 1st respondent however had to provide a reasonable and suitable accommodation for the petitioner and the children of a standard as close as possible to the standard of living the petitioner and the children had enjoyed before the breakdown in their marriage; and in the alternative to pay the petitioner RM2,000 per month *in lieu* of rental. (paras 51 & 52)

- A (5) Since, the jewelleries were worth RM34,000, the petitioner was awarded RM15,000 and allowed to keep the jewelleries already with her. (para 54)
- B (6) Both EPF Accounts of the 1st respondent and the petitioner were matrimonial properties. Out of the total sum saved in both Accounts, the petitioner could use 40% and the other 60% was to be held in trust for the two children. The 1st respondent had to continue paying the life insurance policy till maturity and the policies were to be held on trust for both children. (paras 57 & 59)
- C (7) The 1st respondent had to contribute 50% of the monthly repayment for the car instalments because the petitioner required the car to move around and also to ferry the children to school and their other activities. (para 60)
- D (8) Since the 1st respondent was abusive and had inflicted injury physically and mentally on the petitioner, an injunction was granted restraining the 1st respondent from assaulting, molesting or interfering with the petitioner. Damages for assault, battery and cruelty was not granted since there is no provision in the law to do so and also since it was not prayed for. (para 68)
- E (9) Circumstantial evidence to prove the allegation of adulterous affair must be so strong that an innocent bystander would reasonably be of the opinion that the alleged act has been committed. The evidence here established that the respondents had an adulterous relationship. The presence of the 2nd respondent had contributed significantly to the breakdown of the marriage. The 2nd respondent had to therefore pay the petitioner RM50,000 in damages to be held in trust by the petitioner for the children until they reached the age of 18 years. (paras 78 & 79)
- F
- G
- H **Case(s) referred to:**
C v. A [1998] 7 MLJ 101 (*refd*)
Diana Clarice Chan Chiing Hwa v. Tiong Chiong Hoo [2002] 1 CLJ 721 CA (*refd*)
James Jemut Masing v. Fiona Frances Masing (f) nee Henderson [1994] 2 CLJ 391 HC (*refd*)
- I *Lee Yu Lan v. Lim Thain Chye* [1984] 1 MLJ 56 (*refd*)
Lim Kuen Kuen v. Hiew Kim Fook & Anor [1994] 3 CLJ 471 HC (*refd*)
Raquiza v. Raquiza [1947] MLJ 202 (*refd*)

Sivajothi K Suppiah v. Kunathasan Chelliah [2006] 5 CLJ 318 HC (*refd*)
Wee Hock Guan v. Chia Chit Neo & Anor [1964] MLJ 217 (*refd*)

A

Legislation referred to:

Law Reform (Marriage and Divorce) Act 1976, ss. 76(4), 77, 78, 92,
93(2)

B

*For the petitioner - Keith Chin (Francis Teron with him); M/s Thomas,
Shankar Ram & Co*

For the 1st & 2nd respondents - Roger Chin; M/s Roger Chin & Co

Reported by Amutha Suppayah

C

JUDGMENT

Abdul Aziz Rahim J:

D

[1] The petitioner and the 1st respondent were lawfully married on 26 September 1992 as shown in exh. P1 – the marriage certificate – and the marriage was solemnized at Persatuan Foochow Kuching and was registered in accordance with the Law Reform (Marriage and Divorce) Act 1976 (“LRMD 1976”).

E

[2] After the marriage the petitioner and the 1st respondent cohabited at No. 238, Tabuan Height Kuching and elsewhere.

[3] Prior to the marriage, the petitioner was working in Holiday Inn Kuching and later with Kuching Plywood Bhd. After meeting the 1st respondent in 1985, the petitioner quit her job in 1989 and went to work with the 1st respondent’s company known as Leasewell Leasing Sdn Bhd as an Administrative Executive whilst the 1st respondent is the Sales Manager. At present the petitioner is an Administrative Manager (Account) at Juara Serata Sdn. Bhd., Kuching.

F

G

[4] Out of the said marriage the petitioner and the 1st respondent have two children – Miss Cassandra Wong Xieyue who was born on 31 October 1995 as evident by the birth certificate exh. P2 and Master Leornard Wong Wui Loong who was born on 23 August 2000 as evident by the birth certificate exh. P3.

H

I

- A [5] The petitioner stated four main grounds for the petition. Firstly, the marriage with the 1st respondent has broken down irretrievably and all attempts at reconciliation had failed. The petitioner and the 1st respondent have not slept together since June 2003 and have lived apart since 25 December 2004.
- B Secondly, the 1st respondent has committed adultery with the 2nd respondent that the petitioner cannot reasonably be expected to live with the 1st respondent and that the petitioner found it intolerable to live with the 1st respondent. Thirdly, the 1st respondent had shown total disrespect for the petitioner and very often made rude and abusive remarks at the petitioner. Fourthly,
- C the 1st respondent had on numerous occasions violently assaulted and battered the petitioner causing the petitioner to sustain shock, injuries, pain and sufferings, mental distress, loss and damage and since February 2004 the 1st respondent had neglected his
- D matrimonial responsibilities and had been found to having an adulterous affair with the 2nd respondent.

- [6] In the circumstances, the petitioner prays for the marriage to be dissolved and that the 1st respondent be ordered to pay for the maintenance of the petitioner and her two children be assessed and the maintenance be paid to the children until they reach 21 years old. The petitioner also prays for the custody, care and control of the two children with reasonable access to be given to the 1st respondent. Further, the petitioner also prays for damages for adultery against the 1st and 2nd respondents. The petitioner prays: (a) that the 1st respondent be ordered to pay monthly instalments for the two condominiums registered in the joint names of the petitioner and the 1st respondent and upon full payment, to transfer the two properties into the joint names of the children as security for their future, welfare and education; (b) that
- E the 1st respondent vacated the condominium at No. 506 Block Camilla, Kasuma Resort, Kuching to provide home for the petitioner and the children. That the RM16,034.67 the balance of proceeds of sale of one of the matrimonial properties owned by the 1st respondent and held by Messrs. S.K Ling & Co, Advocates be paid to the petitioner; (c) that the 1st respondent be ordered to pay monthly instalments for the petitioner's Proton Waja which is still under finance till full and final payment; (d) that
- F the 1st respondent be restrained from transferring out, siphoning off and or however disposing or dissipating the fund from the life and
- G
- H
- I

endowment insurance and EPF contributions of the 1st respondent and that the said fund be held by the 1st respondent on trust for the two children; (e) that the petitioner keeps the matrimonial jewellerys and the 1st respondent be ordered to deliver to the petitioner the said jewellerys; and (f) that 1st respondent or his agents and servants be restrained from assaulting, molesting and interfering with the petitioner.

[7] In his answer to the petition, the 1st respondent blamed the petitioner for the breakdown of the marriage. The 1st respondent averred that it was the petitioner who insisted the 1st respondent to sleep in another room so that the 1st respondent could watch TV without disturbing the petitioner's sleep. The 1st respondent alleged that the petitioner had neglected all reconciliatory attempts by neglecting and deserting the family. The 1st respondent also said that the petitioner keeps an irregular lifestyle and late hours at night. The 1st respondent said the petitioner had a penchant for drinking and was keeping late nights; and that when the petitioner returned home from her nights out, she would smell of alcohol and tobacco. The 1st respondent also alleged that on 21 January 2005 and 22 January 2005 the petitioner and her sister-in-law one Regina Chai, brought the two children Cassandra and Leonard to a pub at Jalan Mendu, Kuching. There the 1st respondent alleged the petitioner and her sister-in-law smoked and drank liquor in front of the children and they went back home only after past midnight.

[8] As to his relationship with the 2nd respondent, the 1st respondent claimed that he only came to know the 2nd respondent in 2007 and his friendship with the 2nd respondent started only after the marriage had broken down.

[9] The petitioner, claimed the 1st respondent, did not show any due respect to the 1st respondent or have any consideration for the 1st respondent's feelings and well being. It was alleged that the petitioner had on several occasions undermined the 1st respondent's position as her husband and also as Manager of Leasewell Leasing Sdn Bhd, Kuching where both of them worked from 1992 to June 2004. One of such occasions was in March 2004 when the petitioner started an uproar at their work place where she violently erupted in anger and publicly berated the 1st respondent. The incident was witnessed by one of the employees,

- A Mr. Lau Gee Hong. It was also alleged that the petitioner threatened to poison the children to death to antagonize the 1st respondent. The 1st respondent said he informed his mother Mdm Chua Geok Hiong about this threat.
- B [10] It was alleged that the petitioner constantly display unacceptable and neurotic behavior. The petitioner in her anger had used her long fingernails to scratch the 1st respondent causing abrasions to various parts of his body. Sometime in April 2004,
- C when the 1st respondent returned to the Condominium at the Kasuma Resort to collect his personal effects, the petitioner approached the 1st respondent at the lift and viciously verbalizing her suspicion that the 1st respondent was having an adulterous affair and started to stab the 1st respondent with her Proton Waja's car keys. As a result the 1st respondent alleged he suffered
- D multiple puncture wounds on his body.
- [11] The 1st respondent alleged that the petitioner also assaulted him on several other occasions. In May 2004, the 1st respondent said the petitioner repeatedly and violently struck the 1st
- E respondent on the head and thighs with a hand-held electric motorized massager/machine causing the 1st respondent to suffer more injuries. Then in June 2004 once again the petitioner assaulted the 1st respondent with her car keys.
- [12] In one of her tantrums and outburst in June 2004, the 1st
- F respondent alleged that the petitioner intentionally picked up the 1st respondent's handphone and smashed it on the floor.
- [13] On his part the 1st respondent denied hitting the petitioner with the incense burner at their Condominium at Kasuma Resort.
- G Instead the 1st respondent said during one of the quarrels which they often had the 1st respondent raised the incense burner to prevent the petitioner from hitting him further. The 1st respondent also denied kicking the petitioner in the stomach during the fight. The 1st respondent said that his plea to the petitioner to stop the
- H fight was not heeded; so he had to use his legs to push the petitioner away and to shield himself from more blows.
- [14] The 1st respondent denied having an adulterous affair and said the claim by the petitioner was baseless. The 1st respondent averred that the petitioner had a fixated paranoia or obsession
- I about the 1st respondent having an affair. The 1st respondent claimed that this neurotic behavior of the petitioner was probably

due to the petitioner's psychological disorder and this condition was admitted by the petitioner in that she had been recommended by one Dr. Lee of Klinik Chiew to undergo psychotic treatment and medication. The 1st respondent alleged because of this psychological disorder the petitioner was unstable and this is reflected when the petitioner admitted to the 1st respondent that she had spiked his Milo beverage with rat poison since end of July 2004. The 1st respondent also claimed that the petitioner had also administered poisonous substance into the 1st respondent's hair shampoo and nasal spray with intent of causing injury and harm to the 1st respondent. The 1st respondent said the petitioner admitted to doing all this to the 1st respondent's mother.

[15] The 1st respondent also denied that he had used the knife to threaten the petitioner and had caused the petitioner to cut his finger. Instead the 1st respondent said that as stated in his police report on the incident he got hold of the knife solely with intent to gain the upper hand but without any intention to inflict any harm on the petitioner. But it was the petitioner who then panicked and seized the knife from him and as a result had cut her own finger.

[16] In other words, the 1st respondent blamed the petitioner's erratic and neurotic behavior for the breakdown of the marriage.

[17] On the family finances, the 1st respondent claimed that from the onset of their marriage the 1st respondent and the petitioner had maintained jointnames accounts of which the petitioner was also one of the signatories for the cheques drawn on the joint accounts. The 1st respondent said he had taken care of the household finance and had fulfilled his financial duties as a father and bread-winner of the family.

[18] On the issue of maintenance the 1st respondent averred that no maintenance is to be paid to the petitioner as her income is more than enough to support herself. However the 1st respondent agreed that reasonable maintenance for the two children is to be shared equally between the petitioner and the 1st respondent. But the 1st respondent claimed that his income had been adversely affected by the waning revenue of Wirasaga Agencies, the insurance agency of which the 1st respondent was one of the agents. The 1st respondent said his average monthly commission from the insurance premium was about RM400-RM500.

A Furthermore, the 1st respondent averred that he no longer enjoyed the commission from car sales since his resignation from Leasewell Leasing Sdn Bhd since June 2004.

B [19] In his answer to the petitioner's petition, the 1st respondent also alleged that the petitioner had admitted to him about her adulterous affair with one Ah Long at their Kasuma Resort Condominium. However there is no direct evidence on this and whatever evidence adduced by the 1st respondent on this issue is so minimal that the court is unable to draw any conclusive inference as to the fact of the alleged adulterous affair having regard to the law the adultery must be proved beyond reasonable doubt.

C [20] However halfway through the hearing of the petition, the parties have agreed to mutual dissolution of the marriage and had further agreed to the care, custody and control of the children be given to the petitioner with reasonable access given to the 1st respondent. With that, the remaining issues left for determination are damages, adultery maintenance and division of matrimonial property.

D [21] With regard to the matrimonial assets, the 1st respondent averred that the petitioner contributed negligibly towards the acquisition of the said matrimonial assets and properties.

E [22] In the circumstances of this case there are only three main issues that require determination. The first issue is maintenance of the petitioner and the two children. The second issue is the division of the matrimonial property and thirdly, damages for adultery.

F
G **On Maintenance**

H [23] With regard to the provision of maintenance for the petitioner and the two children, the 1st respondent testified that he is willing to provide for them but given the present circumstances he is in, he was and is not able to. He told the court in his evidence that he has no permanent job and therefore has no regular income. On average he said he earned about RM300-RM400 per month as car salesman and doing odd jobs. He testified that he could only afford RM150 as maintenance at present and is willing to increase the amount if he gets a steady employment and as his financial situation improves.

I

[24] As for the maintenance of the two minor children Miss Cassandra and Master Leonard, learned counsel for the 1st respondent's counsel submitted that the court must consider the reasonable need of the children for accommodation, clothing, food and education and balance this with the means of the father to pay maintenance. Taking this approach, it was submitted for the 1st respondent that on the evidence in this case it is clear that the petitioner is having a steady earning job as an Administrative and Account Manager in a private firm ie, Juara Serata Sdn Bhd earning a monthly salary of RM2,700, excluding bonuses. Whereas the 1st respondent is currently unemployed and is doing car sales earning between RM300 to RM400 per month. Even that the income is not regular and can hardly meet his own needs.

[25] Learned counsel for the 1st respondent cited the case of *Diana Clarice Chan Chiing Hwa v. Tiong Chiong Hoo* [2002] 1 CLJ 721 where the Court of Appeal refused to grant the wife's claim for maintenance for herself and a child in the sum of RM50,000 per month after taking into consideration that the wife also had a price to pay for the breakdown of the marriage. The court instead awarded the wife's maintenance of RM25,000 per month for her and the child. Of course in that case the husband's financial position was in vey much better position than most – the husband was a multi-millionaire and a fact which the court did not doubt as the court in that case found that the husband “is not a struggling wage earner as he could afford lavish overseas holidays for the family and was generous towards the wife”. On the same vein, learned counsel for the 1st respondent urged the court in this instant to consider that the petitioner also had to pay the price for the breakdown of the marriage.

[26] It is also in evidence and not in dispute that the two children in this instant attended various activities besides their normal school activities. The two children in this case attended various additional classes like piano classes, tuition classes and swimming classes and also self defence classes. These additional classes are good to have as testified by the petitioner provided the parents can afford it and are able to pay for them. However in my view they are not absolute necessity to have to develop the children into person of character or a rounded individual. In the circumstances, learned counsel for the 1st respondent submitted that it would be unfair to penalize the 1st respondent by ordering

A him to provide for these various activities of the children when the 1st respondent is himself struggling to make ends meet in his daily life.

B [27] One of the considerations in awarding maintenance is that the sum awarded must be reasonable to enable the wife and the children to enjoy the lifestyle they were used to before the breakdown of the marriage. This was the consideration on which the wife in *Diana Clarice's* case (*supra*) premised her claim for RM50,000 per month and it is also the consideration on which C the Court of Appeal allowed the RM25,000 per month as maintenance in that case. This is what the court in that case said at p. 729:

D However bearing in mind the generous lifestyle that she was used to, we consider that a monthly sum of RM25,000.00 for her and Stefany would be sufficient to maintain both of them

E [28] In the same case the court also ordered that the husband to pay all the arrears of the maintenance sum ordered for a period of one year preceding the effective date of the order on the maintenance because the court in that case found that the husband had failed to maintain both the wife and Stefanie during that period.

F [29] In this instant case, the petitioner testified that she spent about RM700 per month for the children's tuition fees, with Cassandra having her tuition for all her subjects ie mathematics, English, Bahasa Malaysia, Science and her Art tuition. Cassandra also attended the piano class. The petitioner also testified that she spent another RM300 yearly on school books and another RM250 G per month for exercise books, stationeries, pocket money and other incidental expenses. Other expenses which the petitioner testified to are: RM500 per year for school uniforms and other clothings; RM200 per month for the children undergarments, school shoes, toiletries and towels and other personal comfort needs; RM500 per month for food and household expenses and H RM500 for utilities and telephone bills. All these expenses add up to RM24,700 per year – an average of RM2,058.33 per month.

I [30] PW7 who had assisted the petitioner in contributing to the upbringing of the children testified that he estimated a sum of between RM600 to RM700 a month for the two children Cassandra and Leonard.

[31] However, learned counsel for the 1st respondent, citing the case of *James Femut Masing v. Fiona Frances Masing (f) nee Henderson* [1994] 2 CLJ 391, submitted that the court should not allow the amount requested by the petitioner. Instead the court must have regard to the fact that 1st respondent had not been proven to be a man of substantial means and may be saddled with a burden if the amount requested by the petitioner is granted. He also submitted that on the evidence the 1st respondent is suffering from diabetes and other medical complications and has to spend monies on his medication as well. In addition he said the 1st respondent also has current liabilities and commitments like the maintenance of his old car.

A

B

C

[32] In my view that is not the only factor that the court must consider. The purpose of the maintenance and its scope must also be looked at. In *Sivajothi Suppiah v. Kunathasan Chelliah* [2006] 5 CLJ 318, the court looks at the nature of maintenance as a “form of material provision that will enable an adult to live a normal life and a child to be brought up properly”. The court also held that “maintenance cannot mean only mere subsistence, ie the food she puts in her mouth but must also means the clothes on her back, the house in which she lives and the money she has to have in her pocket, all of which vary according to the means of the man who leaves a wife behind”. Then the court came up with a strong statement that “it is a settled law that it is the duty of the father to maintain the standard of living the children had enjoyed in the past ie during the existence of the marriage”. Similar principle was stated in *C v. A* [1998] 7 MLJ 101 which referred to an earlier case of *Raquiza v. Raquiza* [1947] MLJ 202.

D

E

F

[33] Bearing the above considerations in mind, regard must also be given to the evidence by the 1st respondent, and this evidence is not seriously challenged, that he did not neglect the family and had not provided for maintenance since June 2004. However, the 1st respondent testified that since their separation in December 2004, the petitioner was the sole custody of their joint account in EON Bank Bhd which at the material time had a credit balance of about RM40,000 to RM50,000 and that he had never asked the petitioner to return a single cent of it.

G

H

[34] As to the law, ss. 92 and 93 of the LRMDA 1976 provide for the power of the court to order a man to pay maintenance for the children; and s. 93(2) of LRMDA 1976 provides that a

I

A woman may be ordered to contribute towards maintenance of the children if the court is satisfied that it is a reasonable thing to do, having regard to her means.

[35] As to the maintenance for the petitioner, s. 77 read together with s. 78 of the LRMDA 1976 empower the court to make an order of maintenance for the wife having regards to the means and needs of the parties as well as the degree of blame which the court apportions to each party for the breakdown of the marriage. With regard to this issue, learned counsel for the 1st respondent submitted that the petitioner is not entitled to any maintenance. Firstly, she was and is earning so much more than the 1st respondent from her steady employment as Administrative and Account Manager at Juara Sdn Bhd with her salary of RM2,700.

[36] However having regard to the evidence as to the means and need of the parties in this case and the law, I am of the view that a sum of RM1,500 per month would be a reasonable award of maintenance for the petitioner and the two children. The fact that the 1st respondent has no steady job or income or that he has medical and health problem with his diabetes, is not an excuse for the 1st respondent to avoid maintaining the petitioner and the two children Miss Cassandra and Master Leonard. The 1st respondent is an able bodied man and could find a job that suits his skill and health condition. In this respect PW3 Dr. Lee Lak Moi testified in examination-in-chief that a chronic diabetic patient should be able to live and work as a normal life. There is no evidence offered by the 1st respondent that since the filing of the petition his diabetic condition had deteriorated.

[37] I am not convinced that the 1st respondent's diabetic condition was chronic and the 1st respondent suffered from mild stroke in 2007 as the 1st respondent attempted to show by producing in evidence R-ID6, a discharge summary dated 26 October 2007 by Dr. Marian Norlee. The reason is that the doctor who signed the discharge summary was never called to testify on the contents of the document. I also accept the evidence that the 1st respondent had failed to provide maintenance to the children since June 2004. However in view of the evidence that the 1st respondent since that time had allowed the petitioner to operate the joint account which has a credit balance of about RM40,000 to RM50,000 I will order that the

1st respondent pay the arrears of the maintenance ordered starting from the date of the petition which is 14 January 2005 until the date of this order which is 15 January 2009 and thereafter the maintenance is to be paid on the 15th day of each month until the children reach the age of 18 years. The 1st respondent is also ordered to pay all the arrears of maintenance within 60 days from the date of this Order. Parties shall have liberty to apply if there is a change in circumstances.

On Matrimonial Assets

[38] In respect of this issue, the matrimonial assets are as follows: (a) the Kuala Lumpur condominium which was bought at RM175,000; (b) the Kasuma Resort Kondominium in Kuching which is valued at RM300,000; (c) the house described as Lot 7306, Block 16 KCLD which had been sold off leaving a balance of the proceeds of RM16,034.67 deposited with Messer. S.K. Ling & Co., Advocates, Kuching; (d) a 27 year old BMW 3 Series with registration No. QKE 635 valued between RM10,000 to RM12,000; (e) one unit Proton Waja bearing registration No. QKQ 5847; (f) jewelleries consisting of (i) 3 Rolex watches worth about RM18,000, one (1) ruby-diamond ring worth RM6,000, one (1) Kruger Rand Gold Coin worth about RM4,000 and several gold rings and pendent worth about RM2,000; (g) life insurance policies consisting of one whole life policy for RM25,000 and one Endowment Life Policy for RM200,000 and (h) the 1st respondent's EPF savings under EPF Account No. 71091511.

[39] In her petition, the petitioner averred that the above assets were acquired through years of her savings, hard work, dedication to the family and selfless contributions and together the 1st respondent, the petitioner and the children were able to enjoy comfort of life, holidays and a good middle class living.

[40] At the trial evidence was led to show that the Kuala Lumpur Condominium was under rental for about a year before it was auctioned off for RM300,000. The rental and the proceeds of the auction were used to pay off the arrears of the monthly payments on the loan for the said property and the outstanding balance of the loan respectively. The 1st respondent testified that the property was registered in his and the petitioner joint names

- A but the petitioner never paid her share of the purchase price of the property. In any case with the property auctioned off, I do not think there is any necessity to make any order as to the division of this property since it no longer belonged to the 1st respondent or the petitioner or to both of them jointly.
- B [41] The Kasuma Resort Condominium, Kuching known as Unit No. 506 Block C, Camilla, is also registered under joint names of the 1st respondent and the petitioner. Therefore, in law each of them is entitled to one half undivided share in the property. The
- C petitioner and the two children were staying at the Condominium until December 2004 when the petitioner moved out of the Condominium taking the two children with her to stay at her brother's place. It is not disputed that the monthly instalment for the bank loan for the purchase of this property was paid by the
- D 1st respondent. However at the trial it was disclosed that no payment on the loan instalments had been made for more than two years. No reason was given for this; but most probably it is due to financial difficulty faced by the 1st respondent. Therefore this property is likely to be seized by the bank and to be
- E auctioned off to recover the loan. However it is not clear on the evidence whether the property has been successfully auctioned off or not. What is certain is that the property is under foreclosure proceedings by the bank. In the circumstances, I will order that in the event the property is auctioned off by the bank, 50% of
- F any excess or residue of the proceeds of the sale or auction after deducting repayment of the bank's loan and other permitted legal expenses connected with the auction or sale shall be paid to the petitioner.
- G [42] As regards the matrimonial property at Kasuma Resort Condominium, Kuching (as well as the Kuala Lumpur Condominium) also, the petitioner in her petition prays that 1st respondent be ordered to pay monthly instalments for the two properties and that upon full settlement of the purchase price, to transfer the two
- H properties into the joint names of the two children as security for their future, welfare and education. The petitioner also prays that she and the two children Cassandra and Leonard be allowed to live at the Kasuma Resort Condominium, Kuching to provide home for the petitioner and the children. Alternatively, the petitioner prays that the 1st respondent be ordered to come up in term of
- I cash for the petitioner to purchase a house equivalent to the

matrimonial properties to be assessed by the court. In the alternative, also the petitioner prays that the value of the two Condominiums be assessed by the court and all cash equivalent thereof be paid to the petitioner for maintenance and upkeep of the children until they attain the age of 21 years. In this respect the petitioner testified that the value of the Kuala Lumpur Condominium was about RM175,000 and that of the Kasuma Resort Condominium, Kuching was about RM300,000. But no valuation reports on the current market value of the two properties by a qualified valuer were tendered as evidence to support this claim. Without such evidence it is quite difficult for the court to assess the value of the two properties since the court does not have the expertise in that field.

[43] In any event, it is my view that the court cannot grant the petitioner's prayers in respect of the two properties. Firstly the Kuala Lumpur Condominium has been sold off. But no evidence were led by either side as to whether there were any excess or residue of the proceeds of the sale or auction available for distribution between the parties.

[44] Secondly, and in respect of the Kasuma Resort Condominium, Kuching, the petitioner did not assist the 1st respondent to pay the monthly instalment on the bank loan when the 1st respondent could not make the payment, and no evidence were adduced to show that the petitioner did so.

[45] Thirdly, the Kasuma Resort Condominium is already under foreclosure proceedings by the bank. If the property had not been auctioned off, it can still be saved if either the 1st respondent or the petitioner or both of them together made an effort to settle the outstanding sum owing to the bank. On the evidence, I do not think the 1st respondent is in the position to do just that. However there is also no evidence adduced to show that the petitioner had made an effort to pay the bank loan and save the property from being auctioned. In a marriage, each spouse bears equal responsibility to ensure that the family is not deprived of their matrimonial home. Therefore if one spouse is in difficulty to maintain the matrimonial home the other spouse must come to assist.

A

B

C

D

E

F

G

H

I

- A [46] Fourthly, the petitioner said she wanted the Kasuma Resort Condominium as a home for her and the children and had in fact prayed for the 1st respondent to vacate the property. This is evidenced by the petitioner's advocate's letter exh. P8. Yet, the
- B petitioner on her own decided to leave the Kasuma Resort Condominium taking with her the two children and went to stay with her brother. There is no evidence to show that the bank had asked them to move out of the Kasuma Resort Condominium because of the non-payment of the monthly instalment of the loan or of the foreclosure proceedings on the property. Therefore, it
- C does not lie in the mouth of the petitioner to come to court and complain that she and her two children are squatting at her brother's home and that they only have the use of the bedroom at her brother's home for the children to study and do their home-work.
- D [47] However the petitioner testified that she found it intolerable to live with the 1st respondent because the 1st respondent had become violent and abusive towards her since the 1st respondent got involved in an alleged affair with the 2nd respondent.
- E [48] The effect of the involvement on the petitioner is very profound. According to PW3 in her medical report exh. P5, the petitioner came to her in June 2004 and with complaints of insomnia, loss of appetite, moodiness and socially withdrawn.
- F PW3's conclusion in her report exh. P2 as to the condition of the petitioner is that the petitioner suffered depression due to the problems in her marriage. The depression she suffered in June 2004 was triggered by a difficult situation in her marriage life and the anxiety in August 2004 was triggered by the violence at home.
- G [49] PW3 is a private medical doctor with post graduate degree to input the skill of family medicine and general medicine. Therefore, she is well qualified to assess the condition of the petitioner then. Nevertheless PW3 further advised the petitioner to
- H see a specialist psychiatrist for medical assessment in June 2004. The petitioner was later seen by the Resident Consultant Psychiatrist at Normah Medical Specialist Centre, Kuching Dr. Loy Jik Hua. In his report exh. P6, Dr. Loy found that the petitioner was indeed depressed and the precipitant for the
- I depression was marital discord. He stated in exh. P6 that there is

no evidence of any paranoia or psychotic thinking or obsession and there was no documentation of any paranoid or psychotic features. He also found that there was no evidence of any clinical depression.

A

[50] The 1st and 2nd respondents never challenged the medical findings and conclusion in exhs. P5 and P6. Therefore the 1st respondent's allegation that the petitioner had moved out of the matrimonial home at Kasuma Resort Condominium on her own free volition because of her neurotic or psychotic paranoid condition about the 1st respondent's alleged adulterous affair with the 2nd respondent is baseless and without merit.

B

C

[51] In my view it is the duty of the husband and the father to provide a roof above his family's head. In this case even though the petitioner and the children had moved out of the Kasuma Resort Condominium without being asked to by the 1st respondent, the petitioner's act is justified. Under the circumstances of this case the act of the petitioner in moving out from the matrimonial home at Kasuma Resort Condominium does not deprive her of her right as a wife to demand from the 1st respondent a roof over her and her children's head. However in the circumstances of the case, I do not think it is just and fair or practical to order the 1st respondent to vacate the Kasuma Resort Condominium and to pay off the bank loan. On the last point, I do not think the 1st respondent has the financial means to do so.

D

E

F

[52] Since I cannot grant the petitioner's prayers in respect of the two properties (ie the Kuala Lumpur Condominium and the Kasuma Resort Condominium) in the form prayed for by the petitioner, I will alternatively order the 1st respondent to provide a reasonable and suitable accommodation for the petitioner and the children of a standard as close as possible to the standard of living the petitioner and the children had enjoyed before the breakdown in their marriage; and in further alternative if the 1st respondent is unable to provide such accommodation, the 1st respondent is pay the petitioner a sum of RM2,000 per month *in lieu* of rental to enable the petitioner to rent or purchase a suitable and reasonable accommodation for herself and the children. This payment shall continue until the children reach 18 years of age or until the petitioner re-marries which ever is the later. At the moment the evidence is that the petitioner and the children are squatting at the petitioner's brother's house.

G

H

I

A [53] With regard to the jewellery, the petitioner's estimate of the
value of the three Rolex watches to be about RM18,000, the gold
diamond ruby ring about RM6,000, the Kruger Rand gold coin
worth RM4,000, the other gold coins worth RM4,000 and the
gold rings and pendant about RM2,000. Some of these jewellery
B were kept by the 1st respondent and some by the petitioner.
From the testimony of the 1st respondent it appears that the
marriage jewellery from the 1st respondent's parents and from the
1st respondent himself and a Rolex watch were kept by the
petitioner and the others must have been kept by the 1st
C respondent. The 1st respondent proposed that each party keep
the jewellery that already with them. However the petitioner
wanted them all and in the alternative the cash equivalent of the
three Rolex watches for her children.

D [54] Section 76(4) of LRMDA 1976 empowers the court to
divide the matrimonial assets or the proceeds of the sale thereof
in such proportions as the court thinks reasonable, except that the
acquirer of the property in question should receive a greater share
ie more than half: *Lee Yu Lan v. Lim Thain Chye* [1984] 1 MLJ
E 56. In this case however there is no disclosure by the petitioner
as to the exact type and amount of matrimonial jewellery she is
currently keeping. But based on the type of jewelleries disclosed
at the trial as stated above, the total value as estimated by the
petitioner is about RM34,000. From this amount I think it is fair
F to award the petitioner RM15,000 and also to let the petitioner
keeps the other jewellery already with her.

[55] Learned counsel for the 1st respondent also urged the court
to include the EPF Account of both parties as "matrimonial
assets" for the purpose of division of matrimonial assets. The
G reason offered by the 1st respondent for this is that the 1st
respondent has agreed for all his saving in his EPF to be held in
trust for his two children Cassandra and Leonard. The petitioner's
EPF Account is the one where most of the EPF contributions
were paid into when both the petitioner and 1st respondent were
H working at Leasewell Leasing Sdn Bhd where the 1st respondent's
main income way out under the petitioner's name. *Lim Kuen Kuen*
v. Hiew Kim Fook & Anor [1994] 3 CLJ 471 is the authority that
says EPF is matrimonial asset acquired during the marriage by the
sole effort of one party to the marriage. The 1st respondent
I argued that because the major part of the 1st respondent's income
while working at Leasewell Leasing Sdn Bhd was credited into the

petitioner's name and EPF deductions were made on those income and paid into the petitioner's EPF Account, therefore it was contended by the 1st respondent that indirectly he had contributed towards the up-bringing and maintenance of the children and the petitioner.

A

[56] On the evidence I have no doubt that the 1st respondent had paid for all the matrimonial properties from his income (ie the commission) from the sales of car for Leasewell Leasing Sdn Bhd. The 1st respondent testified that his commission per month while working at Leasewell Leasing Sdn Bhd was around RM6,000 to RM8,000 per month depending on the condition of the market.

B

C

[57] Therefore I will order that both EPF Accounts of the 1st respondent and the petitioner be included as matrimonial properties. And out of the total sum saved in both accounts, the petitioner may use only 40% of the saving therein and the other 60% is to be held in trust for the two children.

D

[58] The other asset claimed by the petitioner is the sum of RM16,034.67 held by Messrs S.K. Ling & Co., Advocates. However exh. P13 shows that the actual amount with the advocates is only RM12,884.67 and the petitioner claimed that the amount should be paid to her as maintenance since the 1st respondent had failed to provide maintenance since June 2004. This amount is the balance of the proceeds from the sale of the Stampin house and this fact is not disputed. The house was sold in late 2004. The petitioner testified that when the Stampin house at Lot 7306, Block 16 KCLD was sold, she paid a sum of RM70,000 into their overdraft facility account with Hong Kong Bank Berhad Kuching and then the 1st respondent withdrew RM55,000 from the account for his own use and promised to repay this amount. However till today the 1st respondent had not paid this amount. I would therefore consider it fair and reasonable to order the amount of RM12,884.67 to be paid to the petitioner towards the account of RM55,000 which I think on the evidence should be returned to the petitioner.

E

F

G

H

[59] As for the life insurance policy worth RM25,000 and an endowment life insurance policy worth RM200,000 the 1st respondent should continue to maintain this policy till its maturity and the policies shall be held on trust for the two children.

I

- A [60] With regard to the BMW 3 Series currently used by the 1st respondent, this should remain with the 1st respondent. As to the monthly repayment of the Proton Saga currently used by the petitioner, the 1st respondent should contribute 50% of the monthly repayment until the full instalment payments on the car is settled. This is because the petitioner would require the car to move around and also for use to ferry the children to school and their other activities.

- C [61] As to the Kenari, I find no clear or conclusive evidence that the 1st respondent had bought or is using this vehicle. Therefore, I make no order on this purported property.

Damages For Adultery And General Damages For Assault, Battery, Cruelty And Domestic Violence

- D [62] I will deal with the petitioner's allegations as to assault and battery first. The petitioner testified that in February 2004, the 1st respondent started to come home late and sometimes never came home at all. Petitioner testified that each time the 1st respondent came home there were several marks on his neck which to the petitioner appeared to be love bites. The petitioner further testified that when she confronted the 1st respondent the latter admitted that he has an affair with the 2nd respondent. The petitioner also testified that in March 2004 the 1st respondent verbally abused her at her place of work at Leasewell Leasing Sdn Bhd in front of all the salesmen.

- G [63] That evening when they got home the petitioner testified that the 1st respondent got so angry that he punched the petitioner on the head and dragged the petitioner by her hair and bang her head against the wall and used a plastic hanger to hit her in front of the children.

- H [64] Another incident of assault and battery by the 1st respondent testified to by the petitioner is the incident in June 2004. In this incident the petitioner said the 1st respondent was angry after they got into argument regarding the 1st respondent coming home late or not coming home at all. The 1st respondent then according to the petitioner picked up a brass incense burner and wanted to slam it on her head. At that time the petitioner said her daughter Cassandra was there and Cassandra got hold of the 1st respondent's leg and asked the 1st respondent to stop.

Fearing for her safety the petitioner said she ran upstairs and went to the bathroom. But the 1st respondent followed her to the bathroom and used his knuckles to hit the petitioner on her head. The 1st respondent also according to the petitioner kicked her in the stomach and her back several times. These beatings were witnessed by the children.

A

B

[65] Earlier in April 2004, at Kasuma Resort Condominium, the petitioner testified that the 1st respondent slapped her in front of the children.

[66] Another incident was on 3 August 2004. On this occasion the petitioner testified that the 1st respondent had grabbed hold a kitchen knife and wanted to slit her throat. In the incident the petitioner cut her right little finger in a scuffle with the 1st respondent. During her testimony the petitioner showed to the court the mark of the injury on her little finger. The petitioner lodged a police report exh. P4 over the incident and the two police officers who took the petitioner's report (PW4) and who recorded a statement from the petitioner (PW5) were also called to testify. In their testimonies PW4 and PW5 corroborated the complaint by the petitioner as regards to this incident.

C

D

E

[67] The petitioner's testimony as to assault and battery by the 1st respondent is corroborated by PW9, the petitioner's daughter, Cassandra Wong Xinyue. At the time to giving evidence PW9 was 13 years old. However when the court asked her whether she understands the requirement to the truth she answered in the affirmative. Having seen PW6 I have no reason to doubt testify as to the truth of her testimony. She appears to me as an intelligent girl that is fully aware of the happenings around her especially the problematic relationship between her mother, the petitioner and her father, the 1st respondent.

F

G

[68] On the evidence in this case, I find the 1st respondent was abusive of the petitioner and had inflicted injury physically and mentally on the petitioner. Therefore, I shall grant the injunction restraining the 1st respondent from assaulting, molesting or interfering with the petitioner after this order. However I could not grant the prayer for the sum RM100,000 as damages for assault, battery and cruelty claimed by the petitioner. I find no provision in the LRMDA 1978 that gives me the authority to do

H

I

A so. Also, no authority was cited or shown to me by the petitioner's counsel to persuade me that I have the jurisdiction and authority to grant such relief.

B [69] Furthermore, the claim for general damages for assault and battery is not prayed for in the petition.

C [70] As to the allegation of the 1st respondent's adulterous affair with the 2nd respondent, the evidence by the petitioner PW1 is that the 1st respondent started to come home late with 'love bites' on his neck. Then April 2004, while she was walking with the children to the elevator at the basement carpark at Kasuma Resort she and the children saw the 1st and 2nd respondents come out from the elevator. But on seeing the petitioner and the children they went back into the elevator. Again this evidence is corroborated by PW9.

D [71] PW1 testified that later on the 1st respondent came down alone and had an argument with her at the basement of Kasuma Resort.

E [72] PW1 also testified that sometime in August 2004, she went to Kasuma Resort after dropping off the children at school, to keep her appointment with her real estate agent for the renting out of the Condominium. On arrival there, PW1 said she saw the 1st respondent's car parked at the very end of the basement car-park. PW1 testified she went up to the Condominium and on opening the door she saw two pairs of shoes near the door. She shut the door and went down again to the basement car-park and waited there for sometime. Later, she testified, the 1st and 2nd respondents came out of the building and walked towards the 1st respondent's car at the basement car-park. When the petitioner went back to the Condominium after that, she went to the master bedroom and the bathroom. In the bathroom she found hair shampoo and feminine wash which did not belong to her. PW1 testified that she had never used these things. This fact was not challenged by the 1st and 2nd respondents. PW1 alleged that the feminine wash belonged to the 2nd respondent because shortly after that the 1st respondent came back to the Condominium to collect the feminine wash.

I

[73] PW1 further testified that when the 1st respondent saw her at the kitchen, the 1st respondent put down the feminine wash on the table in the kitchen and grabbed the kitchen knife and started to assault her. PW1 lodged a police report No. 3719/04 at Simpang Tiga Police Station on the incident. The report is produced as I.D.4.

A

B

[74] In the master-bedroom PW1 saw the bed was untidy with one pillow on one side and the other pillow on the other side of the bed.

[75] PW1 also testified that on 29 July 2005 she and the children together with her brother and her brother's family saw the 1st and 2nd respondents sitting together at the Kuching Central Commercial Centre Park, and the 1st respondent totally ignored the children.

C

D

[76] It is also the petitioner's testimony that on one occasion she saw the 1st and 2nd respondents coming down from a shop lot at Jalan Ban Hock in the morning. The petitioner testified that she believed the 1st respondent rented the premises there. The petitioner also testified that she saw the 1st respondent's car BMW QKE 635 parked near Jalan Ban Hock several times – usually in the evening and at night.

E

[77] The above testimony by the petitioner is generally not rebutted. The petitioner was cross-examined vigorously on the matter; yet she was steadfast in her story.

F

[78] It is a fact to be recognized that very rarely the act of adultery is proven by direct evidence. To be able to do so, there must be a witness who saw and can testify to the actual act of adultery with would naturally involve a sexual act on the part of the parties alleged to have committed the adultery. More often the allegation of adulterous affair is proven by circumstantial evidence. However such circumstantial evidence must be so strong that an innocent by stander would reasonably of the opinion that the alleged act has been committed.

G

H

[79] In *Wee Hock Guan v. Chia Chit Neo & Anor* [1964] MLJ 217, it was held that an allegation of adultery must be proved beyond reasonable doubt. The evidence must to beyond establishing suspicion and opportunity to commit adultery and must be such as to satisfy the court that from the nature of things

I

- A adultery must have been committed; where the evidence is entirely circumstantial, the court will not draw the inference of guilt unless the facts relied on are not reasonably capable of any other explanation. On the above principles and on the evidence in this case as narrated above, I am satisfied the circumstantial evidence
- B herein not only shows that there is opportunity for the 1st and 2nd respondents to commit adultery but the totality of the evidence points to no other explanation as to why the 1st and 2nd respondents were at the Condominium at Kasuma Resort and later on the petitioner found the bed in the master bedroom was
- C in a mess as if it have been recently used. To confound this is the fact that the 2nd respondent had left behind in the bathroom her feminine wash which was later picked up by the 1st respondent. Thus on the evidence in this case I am satisfied that the 1st and 2nd respondents have had an adulterous affair and
- D relationship. I am also satisfied that the presence of the 2nd respondent in the married life of the 1st respondent and petitioner has contributed significantly to the breakdown of their marriage. Therefore I shall order that the 2nd respondent pays the petitioner a sum of RM50,000 in damages. This sum is to be held
- E in trust by the petitioner for the two children until they reach the age of 18 years.

- [80] On the above reasons, I shall order that the marriage be dissolved and *decree nisi* to be absolute in three months from the date of the Order. The care and custody of the two minor
- F children Miss Cassandra and Master Leonard shall be given to the petitioner as previously agreed between the parties with reasonable access given to the 1st respondent. As to maintenance, division of matrimonial properties and damages for adultery, I shall
- G make the Order as decided and ordered earlier in this judgment.

- [81] Lastly, I want to be on record that after the delivery of the decision in this case, learned counsel for the petitioner informed the court that both the 1st respondent and the petitioner have been declared bankrupt and that the 1st respondent holds two
- H respective accounts for the children with Public Bank Berhad which is now frozen due to the bankruptcy Order. Learned counsel for the petitioner made oral application for an additional Order that the 1st respondent reports to the Director-General of
- I Insolvency to resolve the status of the two accounts so that the children be entitled to utilized their respective bank accounts.

Learned counsel for the petitioner also made an oral application for an Order that the order of reasonable access to the two children granted to the 1st respondent be supervised in the presence of the petitioner. However I refused the two oral applications by the learned counsel for the petitioner.

[82] As to the first oral application, I am of the view that the petitioner or the 1st respondent should make a formal application to the bankruptcy court to release the two accounts that belongs to the children by stating the full facts and particulars of the accounts so that all parties could be heard on the issue. As to the second oral application, I am of the view that the 1st respondent and the two children should be given the opportunity and freedom to interact with each other without any supervision from the petitioner. After all, the 1st respondent is the biological father to the two children. Furthermore, there is no evidence throughout this trial that shows the 1st respondent having a violent disposition or any ulterior motive towards the children.

A

B

C

D

E

F

G

H

I

